STATE OF MICHIGAN
IN THE SUPREME COURT

HERALD COMPANY, INC., d/b/a BOOTH NEWSPAPERS, INC. and THE ANN ARBOR NEWS, Plaintiff-Appellant, vs. EASTERN MICHIGAN UNIVERSITY BOARD OF REGENTS, Defendant-Appellee.	Supreme Court Case No. 128263 Court of Appeals Case No. 254712 Washtenaw County Circuit Court Case No. GC-W-04-0000117-CZ

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BRIEF OF AMICUS CURIAE MICHIGAN MUNICIPAL LEAGUE LEGAL DEFENSE FUND

ORAL ARGUMENT NOT REQUESTED

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STATEMENT OF BASIS OF JURISDICTION

Amicus Michigan Municipal League Legal Defense Fund adopts and incorporates the Statement of Basis of Jurisdiction as set forth in the brief of Defendant-Appellee Eastern Michigan University.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. **DID THE COURT OF APPEALS CORRECTLY APPLY THE APPROPRIATE STANDARD OF REVIEW?**

   Court of Appeals says: "Yes."

   Defendant-Appellee Eastern Michigan University says "Yes."

   Amicus Michigan Municipal League Legal Defense Fund says: "Yes."

   Plaintiff-Appellant says: "No."

2. **DID THE WASHTENAW COUNTY CIRCUIT COURT ERR IN APPLYING THE §13(1)(m) FREEDOM OF INFORMATION ACT EXEMPTION, MCL 15.243 (1)(m), TO THE RECORD IN QUESTION?**

   Trial Court says "No"

   Court of Appeals says: "No."

   Defendant-Appellee Eastern Michigan University says "No."

   Amicus Michigan Municipal League Legal Defense Fund says: "No."

   Plaintiff-Appellant says: "Yes."

3. **WERE THE PURELY FACTUAL MATERIALS, IF ANY, CONTAINED WITHIN THE PUBLIC RECORD PROPERLY INCLUDED WITHIN THE SCOPE OF THE EXEMPTION?**

   Trial Court says "Yes."

   Court of Appeals says: "Yes."

   Defendant-Appellee Eastern Michigan University says "Yes."

   Amicus Michigan Municipal League Legal Defense Fund says: "Yes."

   Plaintiff-Appellant says: "No."

COUNTER-STATEMENT OF FACTS

Amicus Michigan Municipal League Legal Defense Fund adopts and incorporates the Counter-Statement of Facts set forth in the brief of Defendant-Appellee Eastern Michigan University.

ARGUMENT

I. INTRODUCTION.

Make no mistake about it: The outcome of this case will significantly affect the ability of public bodies in Michigan to investigate and uncover public wrongdoing. If the decision of the Court of Appeals is reversed, public bodies will lose one of their most important and effective tools in fighting the misuse of public office and/or public funds, e.g., their ability to maintain the confidentiality of statements made by individuals who provide critical information about such public wrongdoing.

Both sides of this issue represent very important roles in our democratic form of government. For our democratic form of government to succeed, public bodies and the media must be able to do their jobs effectively. There is no question that the media (and the public) are generally entitled to full and complete disclosure regarding the actions of public bodies and officials. That is one of the essential protections in our democratic form of government. This policy is clearly embodied in the broad disclosure provisions of the Michigan Freedom of Information Act, MCL 15.231(2).

There is also no question that, under certain circumstances, the Michigan legislature has determined that the public interest is better served when a public body is able to exempt from the media and the public certain information. This policy is clearly embodied in MCL 15.243, which sets forth twenty-six categories (and sixteen subcategories) of exemptions from disclosure under FOIA. This case represents a tension between these two very important public policy issues and requires a balancing of the two.

This case also represents one of the most difficult tasks required of a public body the investigation of its highest appointed administrative official – the one closest to the me of the public body and the person usually in charge of the administration of the public This situation presents a myriad of immediate problems for the public body, including (1 will the public body conduct the investigation? (2) who will conduct the investigation? (3 resources will those conducting the investigation have at their disposal? (4) how can the body keep the subject of the investigation from influencing or interfering wit investigation? and, perhaps most importantly, (5) how can the public body give those emp who can provide crucial information in the investigation the comfort and security of kn that the information they provide will be kept confidential and that they will not suff adverse consequences if they provide that information?

Public law attorneys who have conducted internal investigations for public bod who have advised members of public bodies who have conducted such investigations, very well that one of the first questions investigators will face from witnesses will be som like this, "Now, what I tell you is all confidential, right?" Or, "He (or she) won't find out this right?" Or, "This isn't going to end up on the front page of the paper, is it?" investigator cannot assure the witness what he or she tells the investigator will be h strictest confidence, the likelihood of obtaining critically important information fro witness (and the likelihood of success of the investigation) declines dramatically.

The majority opinion of the Court of Appeals hit the nail on the head when it sta following regarding the reason for the "frank communications" exemption in FOIA:

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> The express recognition by the Legislature of the need for candor and its vital role in internal decision making and internal investigations gave birth to the frank communications exemption, and, were we to hold this exemption inapplicable under these facts, this may very well sound the death knell of this vital tool for board members to discharge their oversight roles for the benefit of the public.

Herald Co v Eastern Michigan University, 265 Mich App 185, 204-05; 693 NW2d 850 (2005).

II. THE COURT OF APPEALS CORRECTLY APPLIED THE APPROPRIATE STANDARD OF REVIEW AS SET FORTH IN FEDERATED PUBLICATIONS, INC v CITY OF LANSING, 467 MICH 98, 649 NW2D 383 (2002) .

This Court, in *Federated Publications, Inc v City Of Lansing*, 467 Mich 98; 649 NW2D 383 (2002), set forth the standard of review to be used by appellate courts when reviewing cases involving exemptions from disclosure under FOIA:

> We hold that the application of exemptions involving legal determinations are reviewed under a de novo standard. Exemptions involving discretionary determinations, such as application of the instant exemption requiring a circuit court to engage in a balancing of public interests, should be reviewed under a deferential standard. We therefore hold that the clearly erroneous standard of review applies to the application of exemptions requiring determinations of a discretionary nature. A finding is "clearly erroneous" if, after reviewing the entire evidence, the reviewing court is left with the definite and firm conviction that a mistake has been made.

467 Mich at 106 (citations omitted).

Thus, there are two standards of review in these types of cases: (1) a "de novo" standard for legal determinations; and (2) a more deferential "clearly erroneous" standard for discretionary determinations.

In *Federated Publications*, the exemption under consideration was MCL 15.243(1)(ix), "personnel records of law enforcement agencies." This exemption permits a public body to exempt such records, "unless the public interest in disclosure outweighs the public interest in

non-disclosure in the particular instance." Thus, the exemption under consideration in *Federated Publications* included a discretionary determination, e.g., a balancing test, similar to the instant case. As a discretionary determination was involved, the proper standard of review was the "clearly erroneous" standard. Or, stated another way, "whether the reviewing court is left with the definite and firm conviction that a mistake has been made." *Federated Publications, supra.*

The exemption at issue in this case also requires a similar balancing test. Preliminary communications within or between public bodies of an advisory nature and covering other than purely factual materials may be exempted from disclosure by a public body if the public body shows that "in the particular instance the public interest in encouraging frank communications between officials and employees of public bodies clearly outweighs the public interest in non-disclosure." MCL 15.243(1)(m).

The majority of the Court of Appeals, in reviewing the determination of the trial court under the applicable "clearly erroneous" standard, properly gave "deference" (per *Federated Publications*) to the trial court's determination after the trial court's in camera review of the Doyle Letter and its consideration of the multitude of factors involved in applying the balancing test.

The fact that the Plaintiff-Appellant and the dissent do not agree with the outcome of the analysis by the majority does not mean that the majority incorrectly applied the standard of review, or that it should have been left with a "definite and firm conviction that a mistake has been made." *Federated Publications, supra.*

III. THE WASHTENAW COUNTY CIRCUIT COURT DID NOT CLEARLY ERR IN APPLYING THE §13(1)(m) FREEDOM OF INFORMATION ACT EXEMPTION, MCL 15.243(1)(m), TO THE RECORD IN QUESTION.

A. The Trial Court Properly Balanced the Public Interests Involved in the "Frank Communications" Exemption in FOIA.

The exemption at issue in this appeal, commonly called the "frank communications" exemption, is set forth in MCL 15.243(1)(m) as follows:

> Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure.

In brief, this exemption requires: (1) the document be a communication within or between public bodies; (2) the document be of an advisory nature covering other than purely factual materials; (3) the document be preliminary to a final action; and (4) the public interest in encouraging frank communication between public bodies must clearly outweigh the public interest in disclosure. Plaintiff-Appellant concedes the first three parts of the test are met. The only question (at least as to the non-factual portions of the Doyle Letter) is whether the circuit court properly balanced the fourth part of the test, e.g., did the public interest in encouraging frank communications within a public body clearly outweigh the public interest in disclosure?

As reiterated in the brief of Defendant-Appellee Eastern Michigan University on page 26, the circuit court made specific findings as to each of these requirements. In regard to balancing the public interest in disclosure against the pubic interest in non-disclosure, the circuit court specifically found:

(3) The public interest in encouraging frank communications within the public body or between public bodies clearly outweighed the public interest in disclosure. The Herald Company's specific need for the letter, apparently to "shed light on the reasons why a highly respected public official resigned in the wake of EMU being caught misleading the public as to the true cost of the President's house," or the public's general interest in disclosure is outweighed by the Board's interest in maintaining the quality of its deliberative and decision-making progress.

Under the standard of review announced by this Court in *Federated Publications*, this discretionary determination by the circuit court is entitled to deference and may only be reversed if the reviewing court "is left with the definite and firm conviction that a mistake has been made."

Additionally, as this Court stated in *Federated Publications*:

> In carrying out its public interest balancing under § 243(1)(s), a circuit court is confronted in each case with differing public interest considerations. In undertaking this balancing, however, the circuit court must consider the fact that the inclusion of a record within an exemptible class under § 243(1)(s) implies some degree of public interest in the nondisclosure of such a record. In contrast with the universe of public records that are non-exemptible, the Legislature has specifically designated these classes of records as exemptible. That is, some attribute of these records has prompted the Legislature to designate them as subject to disclosure only upon a finding that the public interest in disclosure predominates. However, we emphasize that these records are merely exemptible and not exempt, and that exemption is not automatic. Nonetheless, in performing the requisite balancing of public interests, the circuit court should remain cognizant of the special consideration that the Legislature has accorded an exemptible class of records.

Federated Publications, supra, at 109-110.

Thus, in balancing the public interests involved, the trial court is required, as it did in this case, to recognize that the legislature implied some degree of public interest in nondisclosure and that the legislature gave special consideration to an exemptible class of records.

This Court has previously recognized and acknowledged in a FOIA case the importance of maintaining confidentiality in internal investigations. In *Kent County Deputy Sheriff's Association v Kent County Sheriff*, 463 Mich 353; 616 NW2d 677 (2000), this Court upheld an exemption under MCL 15.243(1)(t) for reports generated during a sheriff's internal investigation of two jail guards who were disciplined. Although the exemption in that case, MCL 15.243(1)(t), applied to records of a law enforcement agency (not the frank communications exemption as in the instant case), the case included a similar public interest balancing test, e.g., the records could be withheld "unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance." MCL 15.253(1)(t).

In upholding the applicability of the exemption, this Court agreed with the circuit court and the Court of Appeals that keeping records of internal investigations confidential was justified for the following reasons: (1) internal investigations are inherently difficult because employees are reluctant to give statements about the actions of fellow employees; (2) if their statements would be a matter of public knowledge, employees might refuse to give any statements at all or be less than totally forthcoming and candid; (3) disclosure could be detrimental to some employees; and (4) public disclosure of records relating to internal investigations into possible employee misconduct would destroy or severely diminish the ability to effectively conduct such investigations. *Kent, supra*, at 365-66. For a similar result and similar justification for keeping records of an internal investigation confidential, see also *Sutton v City of Oak Park*, 251 Mich App 345; 650 NW2d 404 (2002).

The Court of Appeals in the instant case correctly acknowledged these risks and considered them in applying the balancing test:

> There is a substantial risk that these vital sources of candid opinions would dry up were insiders justifiably fearful that their candid appraisals would make front-page headlines. This is especially true where, as here, the Board is investigating potential misconduct of a high-ranking official and seeks the insight of other high-ranking officials who work for and side-by-side with the target of the investigation.
>
> * * * *
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> But, where, as here, a board needs insiders' opinions to investigate other insiders to protect the use of public funds and, where that board honorably discharges its obligations, the public interest in nondisclosure clearly predominates. Indeed, this factual scenario strikes us as the prototype the Legislature had in mind when it adopted the frank communications exemption in the FOIA. The express recognition by the Legislature of the need for candor and its vital role in internal decision making and internal investigations gave birth to the frank communications exemption, and, were we to hold this exemption inapplicable under these facts, this may very well sound the death knell of this vital tool for board members to discharge their oversight roles for the benefit of the public.

265 Mich App at 203, 204-05.

The application of the balancing test by the Court of Appeals above is similar to the application of the balancing test by this Court in *Kent, supra*, e.g., the consideration and acknowledgment of the need for confidentiality in conducting internal investigations.

B. The "Particular Instance" Language in the Exemption Relates to the Categorization of the Records Requested, Not the Individual Circumstances of People Involved in the Incident.

It is important to note that the reasons justifying confidentiality in *Kent, supra*, were generalized statements regarding the importance and necessity of confidentiality in internal investigations. They did not relate, as Plaintiff-Appellant and its Amici claim is required by the "particular instance" wording, to the circumstances of the individuals involved in that particular case. Thus, Plaintiff-Appellant's and its Amici's contention (as well as that of Judge Whitbeck

in his dissent below) that the resignation of University Vice President Patrick Doyle abolishes the reason to consider the need for confidentiality in internal investigations in general is squarely inapposite to this Court's decision in *Kent, supra*.

Furthermore, such a contention is contrary to the actual wording of the balancing test language in the "frank communication" exemption. The balancing test portion of the exemption is stated as follows:

> This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure.

MCL 15.243(1)(m).

The operative words for this part of the analysis are ". . . the public interest in encouraging frank communication between officials and employees of public bodies . . . ." This language permits and requires consideration of the public interest in encouraging frank communication between officials and employees of public bodies in general, as was properly done by the trial court and Court of Appeals below and by this Court in *Kent, supra*.

For Plaintiff-Appellant's and its Amici's argument to be correct (that the determining factor for the Court in the need for confidentiality or lack thereof should be that Vice-President Doyle had resigned), this Court would have to adopt an interpretation of MCL 15.243(1)(m) that would have the effect of inserting the bolded and bracketed words indicated below:

> This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between **[the]** officials and employees of **[the]** public **[body involved in the communication]** clearly outweighs the public interest in disclosure.

This wording, if included in the statute, would have made it clear that the legislature required the consideration of the circumstances of the public officials, employees, and the public body involved. However, this Court has no authority to interpret a statute in a manner that inserts words into the statute that are not present. *Mayor of City of Lansing v Michigan Public Service Comm'n*, 470 Mich 154; 680 NW2d 840 (2004). To accept the interpretation of the "particular instance" requirement advanced by Plaintiff-Appellant in this case would be nothing other than the same improper "judicial legislation" which Plaintiff-Appellant accuses the majority of doing in its opinion.

Furthermore, this Court, in *Federated Publications*, interpreted the "in the particular instance" language to apply to the category of documents involved in the FOIA request, not the particular circumstances of the employees of the public body that may have been involved.

> In light of this language (*in the particular instance*), we believe that public records reviewed under the FOIA balancing test must be organized within reasonably specific categories that enable the circuit court to weigh similar competing aspects of the public interest. In some cases, it may be clear that the FOIA request is comprised of a sufficiently precise or narrow category of records that the circuit court can adequately balance the public interests at stake without the need of further "particular instance" categorization. See, e.g., Kent Co, supra, at 399, which involved a narrow request for records on which disciplinary decisions regarding two prison guards were based. Conversely, a FOIA request may be general and entail a request for records relating to varied subjects, arguably implicating several different aspects of the public interest. In such cases, the circuit court may be required to conduct a "particular instance" categorization of records to enable it to identify and weigh similar aspects of the public interest in favor of disclosure or nondisclosure.

Federated Publications, supra, at 110-111.

As stated by this Court above, the "particular instance" language refers to the situation from which the document in question was created and which should be used to categorize the

document. In this case, the "categorization" would be a document related to an "internal investigation." The "particular instance" language does not relate to the individual circumstances of a person who may have been involved.

C. The Court of Appeals Properly Considered and Applied the "Clearly Outweighs" Requirement of the Frank Communications Exemption.

Plaintiff-Appellant and its Amici contend that the Court of Appeals did not properly apply, or even worse just ignored, the "clearly outweighs" requirement of the frank communications exemption. More accurately stated, Plaintiff-Appellant and its Amici disagree with the outcome of the Court of Appeals application of the "clearly outweighs" requirement. By "cutting and pasting" various sentences from the Court of Appeals decision, Plaintiff-Appellant and its Amici try to leave this Court with the impression that although the Court of Appeals may have stated the "clearly outweighs" requirement correctly, it did not apply it correctly. A careful review of the Court of Appeals opinion indicates that it considered and properly applied the requirement, although not to Plaintiff-Appellant's and its Amici's liking.

Here's what the Court of Appeals said in describing and applying the "clearly outweighs" requirement:

> The exemption forces courts to view the big picture and ask whether the public interest in the disclosure of a particular piece of information may be clearly outweighed by certain decision-making realities in which the disclosure would ultimately frustrate the goal of good governance.
>
> * * * *
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> However, the Michigan exemption is more limited (than the federal exemption): in order to prevent disclosure, the government must not only show that disclosure would inhibit frank communications, it must articulate why the

promotion of frank communications, "in the particular instance," "clearly" outweighs the public's right to know.

* * * *

When, as here, the public body makes the proper showing that good governance is better served by nondisclosure than by disclosure, it will not be required to release the information. To make the proper showing, the public body must show that the information falls within the frank communications exemption and that nondisclosure clearly outweighs the public's interest in disclosure.

* * * *

Had this been a case in which the president himself concealed documents to hide his alleged misconduct, with the complicity of the Board, then the balancing of public policy interests and the calculus of decision making would clearly weigh in favor of disclosure. But, where, as here, a board needs insiders' opinions to investigate other insiders to protect the use of public funds and, where that board honorably discharges its obligations, the public interest in nondisclosure clearly predominates. Indeed, this factual scenario strikes us as the prototype the Legislature had in mind when it adopted the frank communications exemption in the FOIA.

265 Mich App at 197, 198, 200, 204 (emphasis added).

Based on the above quotations, it is evident that the Court accurately described the "clearly outweighs" requirement and correctly applied it in this case.

IV. THE FACTS INTERTWINED IN THE DOYLE LETTER WERE PROPERLY INCLUDED WITHIN THE SCOPE OF THE EXEMPTION.

The frank communications exemption applies to communications " . . . to the extent that they cover other than purely factual materials . . . ." MCL 15.243(1)(m) (emphasis added).

It is clear from this language that the legislature anticipated that frank communications would include some facts. Indeed, it is hard to imagine any preliminary, advisory communication that would not need at least some facts to provide a reference point or basis for the frank communication. By inserting the qualifying language "to the extent that they cover

other than purely factual materials," the legislature protected the facts included within the frank communication.

The trial court, after reviewing the Doyle Letter in camera, concluded that the letter "contains substantially more opinion than fact and that the factual material is not easily severable from the overwhelming majority of the comments . . . ." The Court of Appeals also reviewed the Doyle Letter *in camera* and did not overturn the determination of the trial court. The determination that the letter contains "substantially more opinion than fact" certainly satisfies the requirement that it covers "other than purely factual materials" and places it squarely within the frank communications exemption.

Plaintiff-Appellant claims that the frank communications exemption doesn't apply to any facts which may be in the Doyle Letter, and all facts in the letter must be disclosed. Plaintiff-Appellant apparently bases this novel claim on MCL 15.244(1), which provides:

> If a public record contains material which is not exempt under section 13, as well as material which is exempt from disclosure under section 13, the public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying.

This provision rightly requires public bodies to separate exempt from "nonexempt material" and disclose the "nonexempt material." However, the problem with the interpretation advanced by Plaintiff-Appellant is that facts which may be included in a frank communication are not "nonexempt material." The "other than purely factual material" limitation does not make all or any facts in such a communication "nonexempt material." The frank communication exemption is permitted to include facts, unless the communication is "purely factual."

To accept Plaintiff-Appellant's interpretation that any facts in a frank communication are "nonexempt material" would render the "other than purely factual material" language surplusage or meaningless. This would violate a general rule of statutory construction, e.g., that a statute must be interpreted to give meaning to every word, and may not be interpreted to make any words meaningless or surplusage. *Pittsfield Charter Township v Washtenaw County*, 468 Mich 702; 664 NW2d 193 (2003).

V. THE DOYLE LETTER DOES NOT FALL WITHIN THE "FINANCIAL RECORDS" PROVISION OF ARTICLE IX, § 23, OF THE MICHIGAN CONSTITUTION OF 1963.

Plaintiff-Appellant and Amici, Michigan Association of Broadcasters and Michigan Press Association, claim that Article IX, § 23, of the Michigan Constitution of 1963, requires the release of the Doyle Letter.

Article IX, § 23 provides as follows:

> All financial records, accountings, audit reports and other reports of public moneys shall be public records and open to inspection. A statement of all revenues and expenditures of public moneys shall be published and distributed annually, as provided by law.

Plaintiff-Appellant's and Amici's claim is simply mistaken. There is no reasonable interpretation of Article IX, Section 23, and/or the Doyle Letter that would result in the Doyle Letter coming within the meaning of the terms "financial records, accountings, audit reports, and other reports of public moneys" in Article IX, Section 23.

The only reported court decision interpreting Article IX, Section 23, belies such an interpretation, notwithstanding the fact that Plaintiff-Appellant and Amici cited and quoted from that decision. In *Grayson v Board of Accounting*, 27 Mich App 26; 183 NW2d 424 (1970), the

Court of Appeals, interpreting Section 23, relied upon and adopted the definition of "financial records" advanced by representatives of the Michigan Department of Accounting in that case. That definition was the following:

> Financial records are those records from which the above statements and reports (audit reports, financial reports, and statements) are made up and include general and subsidiary ledgers within which summary and detail entries are made from documents, listings, and recapitulations. That documents such as payrolls, expense vouchers, purchase orders, receipts vouchers, warrants, applications for licensure and the like are not financial records and are not available to the public.

27 Mich App at 34 (emphasis added).

Based on the above, financial records for purposes of Article IX, Section 23, are records which are made from audit reports, financial reports, and statements and include general and subsidiary ledgers which summarize and detail entries made from documents, listings, and recapitulations. Financial records do not include payrolls, expense vouchers, purchase order, receipts vouchers, warrants, and applications for licenses. If none of the latter are included in the term "financial records," then surely a document like the Doyle Letter is likewise not included.

CONCLUSION

The decision in this case will affect the future ability of public bodies and the media to obtain information like the Doyle Letter. The issue is not really whether the media will get the information at issue; it is rather whether a public body will be able to get the information in the first place. As discussed above, a public body will not get this type of information if it cannot promise confidentiality. In that sense, whether the media can get it becomes academic, because if a public body cannot get it initially, then the media won't get it either. It is surely

better, and within the intent of the legislature in enacting the frank communication exemption, that the public body get such crucial information rather than no one get it.

RELIEF REQUESTED

For the reasons stated above, amicus curiae Michigan Municipal League Legal Defense Fund respectfully requests this Honorable Court affirm the decision of the Court of Appeals.

Dated: October 5, 2005

Respectfully submitted,

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